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IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE HONORABLE J. DENNIS HASTERT, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANTS

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J. Dennis Hastert, Representative of the 14th Congressional District of Illinois and Speaker of the United States House of Representatives (hereinafter referred to as "the Speaker" or "Speaker Hastert"), submits and files this brief with the consent of the parties.[1]

[1] All parties have filed blanket consent forms with the Clerk of Court. *Amicus* states that no party to this case authored any portion of this brief and counsel for the Speaker received no monetary contribution toward the preparation of this brief from any person or entity other than the Speaker and the Republican National Committee.

INTEREST OF AMICUS

Speaker Hastert has served as Speaker of the United States House of Representatives since the 106th Congress. As such, Congress passed the Bipartisan Campaign Reform Act of 2002[2] (hereinafter referred to as the "BCRA") during his tenure. It is with an appreciation of the gravity of this action that the Speaker submits this *amicus curiae* brief in support of the appellants' constitutional challenge to the BCRA.

In its review of this case, the United States District Court for the District of Columbia found significant portions of Title I of the BCRA to be constitutional. (Memorandum Opinion, D. D.C. May 1, 2003). Specifically, the District Court upheld those portions of Title I which prohibit federal candidates from having any involvement in the solicitation of "soft money". *Id.* These provisions directly impact the ability of Members of Congress to participate in the political process. Yet, despite devoting over 1,600 cumulative pages to its analysis of the constitutionality of the BCRA, the lower court's opinion provides precious little, if any, substantive analysis of the degree to which the new law curtails the constitutional rights of Members of Congress. For this reason, Speaker Hastert has a direct interest, both in his own capacity, and on behalf of other Members of Congress, in ensuring that those portions of the BCRA most affecting the Members receive the constitutional scrutiny which, heretofore, has been lacking.

The Speaker occupies a unique position in American government. His position allows him to set the agenda of the House of Representatives, assign Members to House Committees, and, like other Members of the House, actively participate in the legislative process. Speaker Hastert is also a member of the Republican Party, and by virtue of his position in Congress, serves as *de facto* head of the

[2] Pub. L. No. 107-155, 116 Stat. 81.

Republican Party when his party does not control the White House. Speaker Hastert's role in American government, however, is neither limited to federal office nor national politics. The Speaker is also a politically active citizen of the State of Illinois and an active member and leader in the Illinois Republican Party. In each of these roles, provisions of the BCRA directly and impermissibly harm the Speaker.

The Speaker is elected from, and by, the Members of the majority party in the United States House of Representatives. The Speaker actively campaigns for Republican Members throughout the nation. Furthermore, as a citizen with a commitment to a political ideology, Speaker Hastert has a vested personal interest in ensuring that his views are represented at all levels of government. Consequently, Speaker Hastert has actively participated in state and local elections, particularly in his home State of Illinois. Although the BCRA does not directly impact the Speaker's legislative role, it does seek to curtail the Speaker's ability to participate meaningfully in the political process, thereby altering the role of the Speaker in American government. Furthermore, it prevents the Speaker, and other Members of Congress, from participating fully in state and local government elections or civic organizations.

In the purported interest of eliminating an "appearance" of impropriety in the manner in which citizens and organizations participate in the political process, the BCRA imposes unwarranted and unconstitutional barriers between federal candidates, their parties, and the individuals they hope to serve. The BCRA infringes upon the rights of the Speaker and other Members of Congress without achieving, or even helping to achieve, its purported goals. Consequently, the Speaker is compelled to support a judicial declaration striking down Title I of the BCRA as unconstitutional.

SUMMARY OF ARGUMENT

The stated purpose of the BCRA is to preserve the confidence the American people have in their Federal government by eliminating the purported appearance of corruption supposedly created by excessive political contributions to elected officials. The BCRA fails to achieve this purpose while simultaneously doing significant harm to the political process. The BCRA directly prevents the Speaker, and other Members of Congress, from participating *fully* in state political activities to the extent permitted by their state's laws and prevents them from actively participating in many types of local civic and business organizations. As drafted and interpreted by the District Court, by mere qualification for federal office, the BCRA restricts the Speaker's (and any other federal candidate's) speech and participation in activities that are totally permissible for other citizens. In essence, the BCRA operates as a forfeiture of civic rights provided by states to their citizens with regard to state and local political activities by doing nothing more than qualifying for federal office.

Subsequent to the District Court's holding, Title I of the BCRA also prohibits all federal candidates and office holders from soliciting or directing money in excess of the BCRA limits to be used in non-federal elections *even if permitted by the state where the candidate is seeking office*. This prohibition prevents the Speaker, and other federal candidates and officeholders, from full participation in the fundraising campaigns of state and local candidates *even where the state regulating the fundraising would authorize more*. Indeed, as drafted and approved by the District Court, the BCRA prohibits a federal candidate from even *talking* about soft money under some circumstances. The Speaker, as a citizen of the State of Illinois, is denied the same rights and privileges as other citizens of the State under the BCRA solely

because he is a federal officeholder. This burden lacks rational basis and consequently violates the Fifth and Tenth Amendments.

If the Speaker, or any Member, seeks to fully participate in state political activities or in other organizations that do not wish to be restricted by the BCRA's "soft money" ban, those Members are arguably obligated to limit, if not eliminate, their involvement with their party's national committee. In reality, this is not an option for many Members who must remain actively involved in their national party committee to satisfy political obligations. The mere fact that the BCRA presents this choice to Members reveals the unconstitutional burden imposed by the new law upon the Members' constitutionally protected freedom of association with their national parties and congressional campaign committees.

Finally, absent the District Court's holdings, the BCRA's infringement upon the Speaker's ability to participate in state political activities and with other organizations contains an outright ban on the receipt or expenditure of "soft money" by national committees of political parties. This ban extends not only to the national political party committees themselves, but to their agents and any entities they control. The Speaker's role in the National Republican Congressional Committee almost certainly renders him an agent of a national committee of a political party under the BCRA. Therefore, under this law, as drafted, any organization that allows, or arguably allows, or tacitly permits, the Speaker to take an active role in its governance or fundraising activities could be subjected to the same "soft money" ban imposed on the national party committees. Any organization not wanting to incur the fundraising and expenditure limitations placed on the national committees by the BCRA will be forced to exclude the Speaker from active participation, limiting him instead to "honorary" positions or as their "special guest" at

events. These intrusive and unnecessary restrictions will chill the ability of the Speaker, and all Members of Congress, to freely associate.

THE ROLE OF THE SPEAKER IN AMERICAN POLITICS

The position of the Speaker combines several roles: the institutional role of presiding officer and administrative head of the House of Representatives, the partisan role of leader of the majority party in the House, and the representative role of an elected Member of the House. As the "elect of the elect", the Speaker has perhaps the most visible job in Congress.

Although the Constitution mentions the Office of the Speaker, it is silent as to his duties. The Speaker possesses substantial powers under House rules. Among his duties are: calling the House to order (Rule I, clause 1); preserving order and decorum within the chamber and in the galleries (Rule I, clause 2); recognizing Members to speak and make motions (Rule XVII); deciding points of order (Rule I, clause 5); presenting the pending business to the House for vote (Rule I, clause 6); appointing select and conference committees (Rule I, clause 2); and referring measures to committee(s) (Rule XII, clause 2). The Speaker frequently is authorized by statute to appoint Members to various boards and commissions, and it is typically the Speaker who is the formal recipient of reports or other communications from the President, government agencies, boards, and commissions.

Although it is not prescribed in any formal way, the elevated profile of the Office of the Speaker often means he must take a leading role in negotiations with the Senate or President. Under both Republican and Democratic majorities, Speakers have played similar roles as leaders of their parties; both within the party conference or caucus and on the House floor. Within the Republican Party conference, Speaker Hastert acts as the chairman of the party's Steering Com-

mittee and thus plays a major part in the committee assignment process. In addition, the Speaker is empowered to make nominations directly for the Republican Conference's consideration for membership (including chairs) on the Rules Committee and the House Administration Committee, as well as the chair and one Member (to serve as the second ranking Republican) on the Budget Committee. House Republican Conference rules also provide for the Speaker to serve on the National Republican Congressional Committee ("NRCC").

Beyond the formalities of the Speaker's official duties, every Speaker is called upon to exercise his personal prestige, and his powers of persuasion and bargaining, to enunciate and advance his party's vision and legislative agenda nationally. The Speaker also works to retain majority control of the House. To accomplish these objectives, modern Speakers engage in a variety of activities, not just in Congress and their party conference, but on the national stage as well. This is primarily accomplished by helping to set party policy and legislative agenda, publicizing those policies and achievements and assisting party members who are seeking election to the United States House of Representatives.

While the Speaker does not serve the NRCC in an official capacity, Speaker Hastert serves the NRCC as its titular head and as a member, *ex officio*, of its Executive Committee. In addition, and particularly when the Republican Party does not control the White House, the Speaker maintains a close working relationship with the Republican National Committee. In these roles, the Speaker is deeply involved in the development and implementation of Republican strategy in the House of Representatives and across the nation. Speaker Hastert further assists with the implementation of Republican strategy through fundraising activities and by acting as a party spokesman and communicator of the party message.

Moreover, Speaker Hastert's activities as Speaker extend well beyond his role with the United States House of Repre-

sentatives and national party politics. After sixteen years of teaching and coaching at Yorkville High School in Illinois, Speaker Hastert served in the Illinois House of Representatives for six years before being elected to the United States House of Representatives in 1986. Entirely separate and apart from his duties as Speaker, Speaker Hastert remains active in Illinois politics to this day. Speaker Hastert has campaigned and raised funds for local candidates to the Illinois House of Representatives, county Republican parties, as well as local and municipal elected officials throughout the state. Speaker Hastert has appeared for, and supported, numerous candidates for local and statewide office and plays an active role in the identification and recruitment of promising candidates for state and local office.

Speaker Hastert's considerable activities for state candidates include participation in fundraising events and the lending of his name to local solicitations for campaign contributions. Even in non-federal election years, Speaker Hastert is an active participant in Illinois politics and in the formation of the Republican message in Illinois.[3] As an Illinois citizen who has never abandoned his primary residence in that state, Speaker Hastert shares the same personal interest in the local candidates and municipal issues as any other state resident. As is the right and privilege of any Illinois citizen, Speaker Hastert participates actively in the political debate, fundraising, and election process crucial to those issues.

Speaker Hastert is also politically active in numerous states other than Illinois. In the past election cycle, Speaker Hastert appeared in forty-nine of the fifty states of the Union in support of local candidates for federal office. The Speaker does not limit his activities in other states to candidates for federal office, however. At virtually every appearance in the

[3] *e.g.* In the State of Illinois, elections for township and local offices are held in non-federal election years. 10 ILL. COMP. STAT. 5/2A-1.2(c).

United States, individuals and organizations, from the highest echelons of the Republican Party to the smallest and most local of grass-root associations, approach Speaker Hastert and solicit his advice and counsel regarding issues of political strategy and legislation.

The Speaker respectfully submits that these activities are a necessary and laudable element of American politics. Few, if any, would argue that these activities represent anything less than quintessential participation in representational democracy in its purest form. Yet, under the BCRA scheme, however well intentioned, the Speaker's participation in these activities is severely, and unconstitutionally, curtailed.

ARGUMENT

I. THE BCRA VIOLATES THE CONSTITUTION BY IMPERMISSIBLY RESTRICTING THE SPEAKER'S ABILITY TO PARTICIPATE IN STATE AND LOCAL POLITICAL ACTIVITIES.

Absent the District Court's ruling, the BCRA painted with a broad brush, banning national committees of political parties from soliciting, receiving, or directing any funds that are not subject to the restrictions imposed by the Federal Election Campaign Act of 1971[4] (hereinafter referred to as "FECA"), as amended by the BCRA. BCRA § 101(a) (adding new FECA § 323(a)(1)). This restriction explicitly included the national congressional campaign committees of a political party in the "soft money" ban. *Id.* The District Court found these broad restrictions to be unconstitutional.

Not only did the ban apply to party national committees and national congressional campaign committees, it also applied to "any officer or agent acting on behalf of such a national committee, and any entity that is directly or

[4] 2 U.S.C. § 431 *et. seq.*

indirectly established, financed, maintained, or controlled by such a national committee." BCRA § 101(a) (adding new FECA § 323(a)(2)).

The BCRA does not define the term "agent", but instead leaves the term open to interpretation by the Federal Election Commission ("FEC"). Recent FEC regulations implementing the BCRA define "agent" as any person who has actual authority, either expressed or implied, to perform certain activities on behalf of their principle. 11 C.F.R. § 300.2(b) (2002). This regulation reads as follows:

> (b) Agent. For the purposes of part 300 of chapter I, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:
>
> (1) In the case of a national committee of a political party:
>
> (i) To solicit, direct, or receive any contribution, donation, or transfer of funds; or,
>
> (ii) To solicit any funds for, or make or direct any donations to, an organization that is described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a) (or has submitted an application for determination of tax exempt status under 26 U.S.C. 501(a)), or an organization described in 26 U.S.C. 527 (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office). . . .

Id.

Given the Speaker's duties for, and responsibilities to, the National Republican Congressional Committee, the Speaker's position would appear to place him squarely within the definition of an "agent" of the Committee as defined by the BCRA and federal regulation. Consequently, the BCRA as

drafted will undoubtedly be applied to him as an agent of a national party and therefore subject him to all limitations the BCRA imposes on national parties.

The Speaker is also a "federal candidate" under the terms of the BCRA. As such, he is subject to specific BCRA prohibitions against soliciting, receiving, directing, transferring, or spending soft money in connection with a federal election. BCRA § 101(a) (adding new FECA § 323(e)(1)(A)). Furthermore, as a "federal candidate," the Speaker is prohibited from soliciting, receiving, directing, transferring, or spending funds in connection with state and local elections unless such funds are subject to the source and amount restrictions of the FECA. BCRA § 101(a) (adding new FECA § 323(e)(1)(B)).

A. The Speaker Will be Prohibited from Taking Any Significant Role in the Activities of His State Party or the Campaign Committees of State Candidates.

As applied by the District Court, the BCRA operates to supersede a state's laws governing its own state citizens in connection with a state election if the person is a federal officeholder or candidate. As held by the District Court, federal candidates and officers lose their rights as afforded under the home state's laws for home state elections. Instead of having the same rights and privileges afforded to every other citizen of the State of Illinois in connection with an Illinois election, under the BCRA as interpreted by the District Court, Speaker Hastert would have those rights *except* where the BCRA limits them. The sole basis for this difference is not that his conduct impacts a federal election (as it would not). Instead, the sole basis for distinction is that he is a federal officeholder.

Absent the modifications by the District Court, if state parties or candidates wish to engage in "federal election

activities", they may do so, but only if they finance that activity exclusively with funds raised subject to BCRA restrictions. BCRA § 101(a) (adding new FECA §§ 323(b) & 323(f)). Thus, while a state party or candidate may solicit campaign contributions without limitation under the applicable law of their home state, they are now prohibited from using that money to engage in "federal election activities" as defined by the BCRA.

As an initial matter, it is clear that these intrusions into the ability of a state to regulate its own political process violate the Constitution. Traditionally, the Elections Clause of the Constitution has been relied upon to give Congress the authority to regulate the financing of federal elections. *See Buckley v. Valeo*, 424 U.S. 1 (1976). However, the Elections Clause does not allow Congress to intrude upon the way a state governs its own political affairs. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. No one would argue that the states have ceded their power to control their own electoral process to the federal government. *See Oregon v. Mitchell*, 400 U.S. 114, 125 (1970) ("No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices."). How then can it be permissible for a law such as the BCRA to place limits on the way that state citizens participate in state elections?

The "federal election activity" definition provided by the BCRA is so broad that it limits the way state parties and state candidates may pay for purely state activities. These restrictions on state parties and state candidates violate the Tenth Amendment and should be declared unconstitutional. Moreover, even if this Court were to conclude that these provisions do not violate the Tenth Amendment, they remain unconstitutional restrictions on First Amendment rights of free speech and freedom of association and Fifth Amendment principles of equal protection.

While implicating serious states' rights issues, the BCRA has even greater personal impact on the Speaker. By imposing arbitrary limitations in a broad manner, the BCRA chills the Speaker's ability to associate with local individuals and groups without rational basis. For example, after careful consideration, the citizens of the State of Illinois, through their legislature, have elected to place fewer restrictions on the financing of local campaigns than those imposed by federal election law. *See* 10 ILL. COMP. STAT. 5/1-1 *et seq.* While Illinois law requires parties and candidates to disclose campaign contributions, it does not place restrictions on either the source or amount of those contributions. *Id.* As noted above, however, the Speaker and other federal candidates forfeit their freedoms afforded by state law under the BCRA. Citizen Hastert could raise funds in excess of the BCRA limits for an Illinois candidate for state or local office under Illinois law. Under the BCRA, Speaker Hastert may not. As others can raise money, it is not the amount of the contribution that can serve as the justification for the restriction. Instead, to support the distinction, the record below would have to show that funds raised by federal officeholders for state elections were somehow *more* corrupting than funds raised by non-federal officeholders. There is no evidence in the record to support this position.

The chill on participation at the state and local level is notable. Local candidates or entities cannot risk being limited from raising funds on unequal terms with their competitors. Accordingly, local Illinois parties, groups and candidates will likely avoid any activities or associations which could even arguably lead to the imposition of these fundraising restrictions upon them. For local Illinois parties and groups, the uncertainty concerning the Speaker's status as a federal candidate and agent of a political party, and the risks of

severe additional regulations borne by groups and individuals who associate with the Speaker, now serve as the basis to blockade the Speaker from those he seeks to serve without rational basis or constitutional authority.

In the absence of the rulings by the District Court, the ramifications would be even greater. The Speaker is the leader of the National Republican Congressional Campaign Committee and is therefore, arguably, an "agent" of that Committee under the BCRA scheme. If the Speaker were to take any role of significance with the Illinois Republican Party, his home state's party, or with the campaign committee of a state candidate, under the BCRA's definitions and scheme, the organization could arguably be deemed to be "directly or indirectly established, financed, maintained, or controlled by" an agent of the National Republican Congressional Committee. BCRA § 101(a) (adding new FECA § 323(a)(2)). If so, then that state organization could automatically become subject to the source and amount restrictions imposed by the BCRA, thereby forfeiting its ability to raise unlimited funds as allowed by Illinois law. The specter of this possible result from mere association with the Speaker will undoubtedly have a chilling effect on the Speaker's involvement with the Illinois Republican Party and with candidates for Illinois State and local government as well as other state and local political parties and candidates.

Moreover, the BCRA does not define or limit the phrase "directly or indirectly established, financed, maintained, or controlled". *Id.* Indeed, the language of the phrase implies that it should be construed as broadly as possible in an apparent attempt to close a perceived loophole in the law before it develops. The FEC has promulgated rules in an attempt to clarify the phrase. 11 C.F.R. § 300.2(c)(2002). This FEC regulation defines political parties, federal candidates, and the agents thereof as "sponsors" and then sets forth ten factors to be considered in determining whether a sponsor "controls" an entity. *Id.* Those factors include

whether the sponsor has the ability to participate in the governance of the entity; whether the sponsor has the ability to "hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity"; and whether a sponsor has common or overlapping officers, members, or employees. *Id.*

Unfortunately, these factors do not serve to limit the potential reach of the language employed by the BCRA. In the case of Speaker Hastert, almost any role that he assumes with the Illinois Republican Party or any local party or campaign could potentially subject that state party to full BCRA restrictions as if it were a national political party. For instance, under the BCRA, the Speaker could not assume a role as an officer or director of the state party because, under the scheme adopted by the BCRA, such a position would permit him to participate in the governance of the entity and potentially give him the ability to hire, appoint, demote, or otherwise control the employees of the state party. He may not even be allowed to serve on minor committees within the state party if such service would place him in charge of employees of the state party. Finally, and perhaps most egregiously, the BCRA scheme as adopted may prevent the Speaker even from being a member of the state party because his membership could be used to show that the Illinois Republican Party had overlapping members with the National Republican Congressional Committee.

One would hope that Speaker Hastert's mere membership in the Illinois Republican Party would not result in the party being considered "directly or indirectly established, maintained, financed, or controlled" by a national party. However, the BCRA creates uncertainty regarding the Speaker's continued active involvement in the Illinois Republican Party. This scenario illustrates the chilling effect that the BCRA has on the Speaker's ability to associate with state political entities and their willingness to associate with the Speaker.

Although this analysis only focuses on the Speaker's roles in the state party, it applies with equal effect to his role in district or local parties and to his role in campaign committees of state candidates. Of course, the BCRA does not explicitly state that the Speaker may not associate with state political entities. Doing so would be a blatant abrogation of the Speaker's constitutional right to associate with like-minded individuals, which is precisely the type of association protected by the First Amendment. *See, e.g., Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). No court would uphold such a prohibition because it is extreme and serves no legitimate purpose, much less a compelling government interest. Instead, the BCRA attempts to cloak its assault on freedom of association by tacitly allowing the Speaker to associate as he sees fit, but imposing draconian limitations on entities in which he actively participates.

In confirming the right of freedom of association, this Court has observed, "the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Although the freedom of association is an individual right, the freedom also extends to political parties. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000). Thus, associations are free to organize and govern themselves as they choose, and the government has no right to interfere with such decisions. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 230 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 ("[P]olitical parties' government, structure, and activities enjoy constitutional protection."). Here, the BCRA has the effect of preventing the Speaker from associating with the Illinois Republican Party by imposing severe restrictions on the party if the Speaker assumes any role of significance. In fact, the BCRA may result in such restrictions on the party if the Speaker

simply retains his membership in that organization. This is a significant burden on the Speaker's individual rights and on the rights of the party.

It is thus apparent that the BCRA significantly impairs the Speaker's First Amendment right of freedom of association. For such an imposition to survive constitutional scrutiny, it must be narrowly tailored to achieve a compelling governmental interest. *See Eu*, 489 U.S. at 231-33 (applying strict scrutiny to a California law that controlled the way a state party was organized). The only governmental interest validly at issue here is the reduction of actual or apparent corruption in the federal government. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (accepting the prevention of actual or apparent corruption in the political process as the only valid basis for the FECA); *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985). In *Buckley*, this Court recognized that large contributions given directly to a candidate could create the appearance of corruption, indicating that the candidate would vote a particular way in exchange for the contribution. *Id.* at 27. Although it is just as likely that such a contribution could be given to the candidate because he already shares similar views as the donor, the Court reasoned that the government's interest in preventing the appearance of corruption was sufficient to warrant limitations on campaign contributions. *Id.* at 29.

The BCRA's infringement on the Speaker's freedom of association cannot satisfy strict scrutiny because it will not achieve, nor even help to achieve, the government's interest in reducing corruption or the appearance of corruption. The Speaker's involvement in his state party in no way implies improper conduct. Much to the contrary, his active involvement in state politics indicates that he is concerned about the citizens and government of his home state. No logical argument can be advanced that restricting the Speaker from participating in state political activity will cause the American

people to have more trust in the federal government. These provisions plainly fail to satisfy any interest of the federal government and therefore must be struck down as unconstitutional.

B. The BCRA Unconstitutionally Discriminates Against the Speaker and Other Members of Congress by Preventing Them From Raising Money For State Candidates as Permitted by State Law.

The BCRA prohibits any federal candidate, including the Speaker, from raising or spending any money in connection with a state or local election that is not subject to the source and amount restrictions of the FECA. BCRA § 101(a) (adding new FECA § 323(e)(1)(B)). Consequently, notwithstanding the fact that Illinois law permits any individual to raise an unlimited amount of money from individuals, corporations, and labor unions on behalf of a candidate for state office, the Speaker's ability to raise money for state candidates in his home state will be restricted by the BCRA. *See* 10 ILL. COMP. STAT. 5/1-1 *et seq.* Under some circumstances, a federal candidate's very *speech* can constitute a BCRA violation in clear contradiction of the First Amendment.

The sole basis for these restrictions is the federal candidate's status as a federal office holder. Because the BCRA will cause the Speaker to be treated differently than other citizens of his state, it violates Fifth Amendment principles of equal protection. This prohibition also violates Tenth Amendment principles of federalism because it intrudes upon the way a state conducts its electoral process. The State of Illinois has determined that it is best to allow its citizens to donate and solicit financial support for candidates in unlimited amounts and from unlimited sources. *Id.* The BCRA steps in and artificially limits the rights of certain

citizens of the State of Illinois, namely Speaker Hastert, and any other federal candidate who is an Illinois citizen.

A state is free to conduct its election activity as it sees fit. *Oregon*, 400 U.S. at 125. Only narrowly tailored infringments to this right necessary to meet compelling government interests are permissible under the Constitution. *Eu*, 489 U.S. at 225. Once again, the BCRA falls well short of that mark. Limiting the Speaker's ability to raise and spend money to help elect candidates in Illinois does not directly relate to his duties as a United States Representative from Illinois. It is true that Speaker Hastert's role in national politics affords him an enhanced ability to raise money for state candidates. But it is also true that such money goes to the state candidate, not to the Speaker. As such, the alleged appearance of impropriety the BCRA purports to prevent becomes tenuous at best. The money received by the state candidate is of no benefit to the Speaker, other than to help ensure that his views are represented in state government. That ideological benefit is far too attenuated to give the appearance of the *quid pro quo* vote buying feared in *Buckley*.

The natural counter-argument to this position is that the Speaker's efforts to help get state candidates elected garner him political support in his own campaign activities. However, that is not the conduct the BCRA purports to curtail. The BCRA will still allow federal candidates to speak or be featured guests at fundraising events for state, district, and local political parties. BCRA § 101(a) (adding new FECA § Sec. 323 (e)(3)). Surely such appearances would engender the support of those in attendance. Since that activity is permitted by the BCRA, this counter-argument to the Speaker's position must fail.

Recently, in an apparent attempt to diminish the impact of Title I on a federal candidate's ability to raise money for state and local candidates, the Federal Election Commission issued an Advisory Opinion that extends the "featured guest" safe

harbor mentioned above to other non-federal fundraising events. FEC Advisory Opinion No. 2003-3. However, the Advisory Opinion does not make Title I any less objectionable. It allows members to speak at non-federal fundraisers as long as they avoid "asking" for money, or in the alternative, if they choose to make any solicitations, they must affirmatively disclose that they are not asking for any donations that would violate the FECA. Requiring federal candidates to make magical incantations in order to solicit funds for a state candidate is an unconstitutional burden on their freedom of speech.

The Advisory Opinion also provides that in the event a federal candidate is mentioned in any advertisement containing a solicitation of funds for a state or local candidate, the advertisement must contain a written explanation that "limit[s] the solicitation to funds that comply with the amount limitations and source prohibitions of the [FECA]." FEC Advisory Opinion No. 2003-3, p. 7. Thus, in any state which allows candidates to raise funds in excess of the limitations imposed by the FECA or from sources prohibited by the FECA, state and local candidates will be forced to exclude any mention of a federal candidate from their fundraising solicitations. Otherwise, the state or local candidate will be unable to take full advantage of their state's campaign finance laws. The Advisory Opinion and its administratively created requirements do not remedy the constitutional infirmities of the BCRA.

The simple truth is that the supporters and drafters of the BCRA view money as a great evil from which political candidates must be sanitized. Even if the fear that money corrupts politicians were somehow valid, which this Court has repeatedly recognized it is not, limiting the Speaker's ability to raise money for state candidates is of no value to that end. *See, e.g., Buckley*, 424 U.S. at 19-22 (upholding the FECA's contribution limits but recognizing that political

speech requires money). Therefore, the BCRA's overwhelming intrusion into the Speaker's participation in state politics fails to meet any compelling governmental interest. As a consequence, these provisions of the BCRA are unconstitutional.

C. The BCRA as Adopted Unconstitutionally Limits the Speaker's Ability to Participate in Other State and Local Organizations.

Because the BCRA as adopted arguably defines the Speaker as an agent of the National Republican Congressional Committee, the Speaker must refrain from participating in any organization that does not wish to be subject to the restrictions imposed by the BCRA. It is easy to discern the types of organizations that would not wish to become subject to the soft money ban imposed on political parties. Churches, civic leagues, business leagues, conservation leagues, and social welfare organizations all prefer to preserve their ability to raise large contributions from individuals and corporations. While the BCRA does allow the Speaker to raise money for these types of organizations, it does not contain a provision specifically authorizing him to be a member of these groups, much less assume a leadership role in the groups without arguably imposing the restrictions of the BCRA upon them. BCRA § 101(a) (adding new FECA § 323(e)(4)).

This severe and unwarranted potential intrusion is a concern of any federal candidate, but much more so for the Speaker due to his role in the National Republican Congressional Committee. If his role in an organization leads to a determination that it is controlled by the National Republican Congressional Committee, then federal law will prohibit the organization from soliciting donations beyond BCRA restrictions. Imagine a church not being able to accept a donation from a parishioner because it exceeds the limitation on donations to a political party, or being prohibited from receiving any contribution from a local business because

corporate contributions are not allowed by the FECA. Such a result is absurd, but entirely possible under the BCRA, as adopted, if the Speaker assumes a leadership role at the church. Similar fates could befall civic leagues or conservation societies if they allow the Speaker to participate meaningfully in their organizations. This is true even if the organization has no political objectives whatsoever. To avoid any possibility of such an outcome, the Speaker must exclude himself from such positions, which, quite obviously, violates his right and the right of the organization to freely associate.

What benefit is derived from this incursion? It is difficult, if not impossible, to determine how preventing the Speaker from assuming a leadership role in his church or in a civic league will engender more confidence in the federal government from American citizens. Indeed, the average citizen, perhaps even the average legislator, would not realize that the BCRA creates such restrictions. Consequently, they cannot engender confidence in the government. Nevertheless, these restrictions clearly exist under the BCRA and demonstrate that the Act is over-inclusive. This violates First Amendment guarantees of freedom of association and Fifth Amendment guarantees of equal protection. Thus, for yet another reason, this Court should declare Title I of the BCRA unconstitutional.

II. THE BCRA AS ADOPTED VIOLATES THE CONSTITUTION BY IMPERMISSIBLY RESTRICTING THE SPEAKER'S ROLE IN HIS NATIONAL PARTY

If the constitutional violations highlighted above are allowed to occur, they will render one inescapable result: For the Speaker to participate in his state government, raise campaign funds for state candidates according to state law, and participate in other non-political organizations, he must relinquish his role as the leader of the National Republican Congressional Committee. Otherwise, he must give up cher-

ished fundamental constitutional rights. This is a Hobbsian choice that the Speaker should not be forced to make.

At the beginning of each session of Congress, the Speaker of the House is elected from, and by, its Members. Ballots are cast until an individual Member receives a majority of the votes cast. As a consequence of this process, the Speaker is always a member of the majority party. To be elected Speaker of the House, a Member must demonstrate the capacity to be a leader among leaders, and, naturally, the Member must show a strong allegiance to his party. Members choose a Speaker for many reasons, including his or her perceived ability to maintain the cohesiveness of the party during the legislative process and to ensure that their party maintains its majority.

The importance of maintaining control of the House to a political party cannot be overstated. To achieve its political agenda, each party strives to gain and maintain a majority in the House of Representatives. This allows the majority party to elect a Speaker, who, in turn, controls the legislative agenda and exerts considerable influence on committee appointments. These powers allow the party, through the Speaker, to focus on enacting legislation that is consistent with the ideological goals of the party.

The very purpose of the National Republican Congressional Committee is to maintain Republican control of the House. The Speaker must assume a leadership role with the NRCC in order to achieve the goals of his office. The NRCC provides the Speaker with the information and resources that are essential to maintaining control and achieving the Republican Party's legislative agenda. It monitors congressional races throughout the United States and helps the Speaker target districts in which Republicans may gain or lose Congressional seats. It helps to unify the political message that Members are presenting to their constituents,

and it provides assistance to congressional candidates during their campaigns.

As adopted, the BCRA will force the Speaker to make a choice: He may continue to serve as the *de facto* leader of the NRCC or he may terminate this role and engage in more significant participation with state political and non-political organizations. In reality, this is not a choice. If the Speaker wishes to retain his position, he must elect to continue his role in the NRCC. Failure to do so would render him unable to assist other Members effectively in their bids for reelection. Furthermore, his ability to assist fellow Members in presenting a unified message and to maintain cohesiveness within his party would be hampered.

Nevertheless, the BCRA clearly punishes the Speaker for electing to associate with the NRCC. To assume his traditional role as a leader of his party, he must sacrifice his individual liberties. This burden on his association with his party is constitutionally impermissible and should not be countenanced by this Court. It should also be recognized that this is a significant attack on the way the NRCC chooses to organize and select its leadership, which, on its own, violates the Constitution. *See California Democratic Party*, 530 U.S. at 573; *Tashjian*, 479 U.S. at 224 ("The Party's determination of the boundaries of its own association, and the structure which best allows it to pursue its political goals, is protected by the Constitution."). Such prohibitions against political participation advance no legitimate ends and can only erode the confidence the American people have in their political process. By pursuing such prohibitions, the BCRA serves only to cause irreparable damage to the very confidences it seeks to preserve.

CONCLUSION

For Members of Congress, the BCRA imposes a forfeiture of constitutional rights simply by virtue of one's being a federal officeholder. The Speaker challenges the restrictions imposed, whether as signed into law or as interpreted by the District Court, on what Members can do for others, not on the limits to what Members can do for themselves. There are no challenges to the new BCRA limits for Congressional campaigns. However, the Speaker challenges the restrictions that tend to isolate Members from their parties and, most significantly, from their home states. It is a political process. Members do not stop being citizens of their home state by virtue of deciding to run for federal office. The BCRA ignores this fact and, as a result, it imposes unconstitutional restrictions unrelated to its purpose to the harm and detriment of Members' fundamental constitutional liberties.

For these reasons, J. Dennis Hastert, Speaker of the United States House of Representatives, respectfully asks the Court to declare Title I of the Bipartisan Campaign Reform Act of 2002 unconstitutional.

Respectfully submitted,

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